

BEFORE THE
Federal Communications Commission
WASHINGTON, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of

Amendment of the Commission's Rules to
Establish New Personal Communications
Services

)
)
) GEN Docket No. 90-314
) RM-7140, RM-7175, RM-7618
)
)

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**PCS PRIMECO, L.P. OPPOSITION TO
CINCINNATI BELL TELEPHONE COMPANY
PETITION TO IMPLEMENT MANDATE**

Pursuant to Section 1.45 of the Commission's Rules, PCS PrimeCo, L.P.¹

("PrimeCo"), hereby opposes the Petition to Implement Mandate of the United States Circuit Court of Appeals for the Sixth Circuit ("Petition"), filed on December 8, 1995, by Cincinnati Bell Telephone Company ("CBT"). The Petition is unsupported and procedurally defective. For the reasons discussed herein, the Commission should dismiss or deny the Petition.

I. INTRODUCTION/STATEMENT OF INTEREST

PrimeCo was the winning bidder for 11 markets in the A/B Block MTA auction. On June 23, 1995, PrimeCo's long form applications for its winning MTA markets were granted. PrimeCo has submitted \$1,107,225,200 in payment for the licenses authorizing it to provide PCS.² PrimeCo (and the other MTA licensees) have also expended enormous financial and other

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¹ PrimeCo is a limited partnership comprised of PCSCO Partnership (owned by NYNEX PCS, Inc. and Bell Atlantic Personal Communications, Inc.) and PCS Nucleus, L.P. (owned by AirTouch PCS Holding, Inc. and U S WEST PCS Holdings, Inc.).

² Collectively, the A/B MTA license winners submitted over \$7 billion for the 99 MTA licenses awarded.

resources in PCS construction and deployment activities over the past several months. All of the MTA licensees are striving to bring PCS to the public at the earliest possible date.

CBT sought judicial review of the Commission's cellular ownership attribution rule with the United States Court of Appeals for the Sixth Circuit. On November 9, 1995, the court granted the CBT petition for review, finding that the Commission did not have a record adequate to support the rule.³ The Court remanded the *Cincinnati Bell* proceeding (and other consolidated appeals) to the Commission for further proceedings consistent with its opinion. On December 8, 1995, CBT filed its Petition requesting that the Commission "adopt appropriate rule amendments consistent with the Court's decision and . . . take such steps as are necessary to afford CBT the same opportunity to participate in PCS as it would have had in absence of the arbitrary cellular attribution rules."⁴

The brevity of CBT's Petition notwithstanding, the impact that grant of its Petition would have on the MTA licensees and the deployment of PCS services in this country is enormous. Under the guise of a short Petition to "implement" the court's mandate, CBT seeks wide-ranging relief in the form of (1) a specific change in the Commission's cellular attribution rules, (2) other so-called "parallel changes . . . necessary to render the rules consistent with the Sixth Circuit's opinion[,] (3) establishment of a procedure whereby parties "adversely affected" by the old attribution rule would be somehow "reassigned" in accordance with proper eligibility rules, and (4) a moratorium on further PCS construction or the exercise of PCS licenses in the Cincinnati MTA pending implementation of the rule changes.⁵

³ *Cincinnati Bell Tel. Co. v. FCC*, Nos. 94-3701/4113, 95-3023/3238/3315 (6th Cir. Nov. 9, 1995) ("*Cincinnati Bell*").

⁴ Petition at 1.

⁵ *Id.* at 4-6.

At the outset, it should be emphasized that CBT's Petition is unclear in the relief it seeks. The Petition itself seeks relief for CBT, presumably in the Cincinnati MTA. However, in portions of its attached "Memorandum of Support," CBT pursues broader relief and appears to seek to upset all of the A/B auction results. To the extent CBT is attempting to overturn all of the A/B auction results, PrimeCo is clearly directly and adversely affected. Furthermore, any delay in PCS deployment — in the Cincinnati MTA or elsewhere — would be tremendously prejudicial and detrimental to PrimeCo and the other MTA licensees. Importantly, delay directly contravenes critical Congressional objectives in the Budget Act⁶ for the rapid deployment of PCS services and increased wireless competition.⁷

II. THE CBT PETITION IS PROCEDURALLY DEFECTIVE AND CBT HAS NO STANDING TO UPSET THE A/B AUCTION RESULTS

CBT has no standing and its Petition is procedurally defective. First, CBT did not file a Form 175 application, a condition precedent to participate in the A/B Block PCS auction — and to bid on or win any A/B licenses. The auction commenced and concluded without CBT's involvement.⁸ CBT cannot *now* claim it is entitled to bid on and acquire a license for the Cincinnati MTA or any other A/B Block licenses, for that matter.

Moreover, after the auction, the winning bidders filed long-form applications establishing their legal qualifications to be PCS licensees. Importantly, CBT did not file a petition to deny against *any* A/B MTA auction winner — nor did it otherwise challenge the A/B

⁶ See Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312 (1993) ("*Budget Act*").

⁷ See 47 U.S.C. § 309(j)(3)(A) (Supp. 1995).

⁸ In fact, CBT was permitted to bid on the Cincinnati MTA, and was granted an extension of the post-auction divestiture time period to come into compliance with the PCS/cellular cross-ownership rule. *Cincinnati Bell Tel Co. Petition for Waiver of Section 24.204 of the Commission's Rules, Order*, 9 FCC Rcd. 7658 (1994).

license grants. CBT cannot *now* complain about the A/B auction results, after license grants have occurred and PCS system construction has commenced. Simply put, CBT's Petition is nothing more than a grossly untimely petition to deny.⁹

Even if CBT had filed a timely petition to deny, CBT has no standing to challenge all of the A/B license grants as it is not a party in interest. In order to establish standing as a party in interest, CBT must demonstrate (1) "actual or imminent" injury in fact; (2) that the injury is "fairly traceable" to the challenged decision; and (3) that the injury is "likely" to be "redressed by a favorable decision."¹⁰ CBT must demonstrate a "causal link 'between the claimed injury and the challenged action.'"¹¹

In its Petition, CBT claims it will suffer economic injury resulting from its inability to use cellular bandwidth in the Cincinnati MTA under its current partnership with Ameritech.¹² This inability to offer wireless service, CBT argues, places it at a competitive disadvantage with other wireless service providers such as Ameritech, a cellular provider in the Cincinnati MSA, which is seeking a waiver of the Commission's rules in order to provide both local exchange and wireless service, and AT&T, a PCS licensee in the Cincinnati MTA, who purportedly "has made no secret that it one day intends to re-enter the local exchange

⁹ Petitions to deny long-form applications for A and B Block licenses were resolved on June 23, 1995. *Applications for A and B Block Broadband PCS Licenses, Order*, 78 RR.2d (P & F) 1216 (Wireless Telecom. Bur. 1995) ("*A/B Block Order*"); *Application for Review pending* (filed July 21, 1995 by Nat'l Ass'n of Black Owned Broadcasters, *et al.*).

¹⁰ *AmericaTel*, 9 FCC Rcd. 3993 (1994) (citing *Sierra Club v. Morton*, 405 U.S. 733 (1972)).

¹¹ *Id.* at 3995 (citing *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59 (1978)).

¹² Petition at 5.

business.”¹³ CBT claims that these companies would have the opportunity to offer “one stop shopping” to its customers by bundling wireline and wireless service offerings.¹⁴ CBT’s claimed “injury,” however, is entirely speculative, and it depends initially on the Commission granting Ameritech the waiver it seeks and AT&T’s actual entrance into local exchange markets within the Cincinnati MTA. This is hardly an “imminent” injury that confers standing on CBT.¹⁵

Further, the extent to which CBT’s claimed injury will be prevented by delaying or upsetting A/B licensing efforts is also obviously dependent on a number of additional contingencies. First, whether CBT’s claimed injury will be redressed is dependent on CBT *actually acquiring* a license in the Cincinnati MTA. While CBT speaks vaguely and tersely of a “reassign[ment]” of licenses, such a procedure would, at a minimum require (1) that the cellular attribution rule to be amended in a particular way so as to suit CBT’s purposes; (2) that the Cincinnati MTA licenses (and/or all of the A/B MTA licenses) would be revoked or rescinded based on retroactive application of the new attribution rule; (3) that CBT subsequently qualifies as an eligible bidder upon re-auction of the licenses;¹⁶ (4) that the auction be held and CBT bids against the two existing A/B Block licensees in the Cincinnati MTA (and perhaps others); (5)

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *See Comm-2 RSA Partnership*, 9 FCC Rcd. 3295, 3297 (1994).

¹⁶ In this regard, PrimeCo notes that CBT is also required to comply with the Commission’s rule that imposes an overall 45 MHz cap on the amount of spectrum that any one CMRS provider may have in the same geographic area. 47 C.F.R. § 20.6. CBT may not be eligible to hold both PCS and cellular spectrum in the Cincinnati MTA. Although CBT speaks of the need for the Commission to make “parallel changes” to the rules on remand (Petition at 4) the spectrum cap rule was *not* appealed in the *Cincinnati Bell* decision. *See Cincinnati Bell*, slip op. at 23 n.6. Further, the FCC recently stated that it is “unlikely” it will revisit the 45 MHz spectrum cap. *See Request of Radiofone, Inc. for a Stay of the C Block Broadband PCS Auction and Associated Rules*, Order, DA 95-2496, released Dec. 20, 1995 (Wireless Telecom. Bur.).

that CBT turns out to be the highest bidder; and (6) that CBT files and prosecutes a successful application to acquire that license. In sum, CBT has not established the likelihood that its claimed injury is redressible.

Further, subjecting *all* A/B Block licensees to delay or the threat of CBT's unspecified reassignment procedure will not redress CBT's claimed injury. In order to challenge the A and B Block grants, CBT "must at the very least allege facts showing how each and every [MTA] grant would result in some demonstrable injury to [it]."¹⁷ CBT makes no effort however, to demonstrate how subjecting PrimeCo's licenses (or the other A/B licenses) to reassignment will facilitate CBT's obtaining a license within the Cincinnati MTA.

III. CBT'S PETITION FAR EXCEEDS THE SCOPE OF THE SIXTH CIRCUIT'S MANDATE

The Sixth Circuit ordered that CBT's petition be "remanded to the Federal Communications Commission for further proceedings in accordance with [its] opinion."¹⁸ The court held that the Commission "fail[ed] to provide a reasoned explanation as to why [] less restrictive alternatives . . . are insufficient."¹⁹ Importantly, however, the court did not mandate the Commission to adopt a particular set of rules or procedures on remand. Moreover, the court did *not* address the validity of the A/B auction or hold that the auction results were in jeopardy or even potentially subject to challenge. Further, it said *nothing* about retroactive application of any possible rule change. Thus, CBT's effort to style its Petition as a mere "implement[ation]" of the court's mandate is disingenuous in the extreme.

¹⁷ *A/B Block Order*, *supra*, 78 R.R.2d at 1218.

¹⁸ *Cincinnati Bell*, slip op. at 30.

¹⁹ *Id.* at 13.

The Commission may either initiate a rule making proceeding to amend its cellular attribution rules²⁰ or it may instead supply the court with a reasoned explanation that passes APA muster.²¹ The Commission certainly is not compelled to adopt the 50% control rule “suggest[ed]” by CBT as a “correct[ion]” to the cellular attribution rule.²² Indeed, the Commission has informally stated its intention to “defend vigorously” the attribution rule.²³ The Sixth Circuit did not invalidate the A/B auction and CBT’s informal effort to undo the Block A/B MTA auction through its Petition to “implement” the court’s mandate is absurd.²⁴

IV. GRANT OF CBT’S PETITION WOULD CONTRAVENE BUDGET ACT REQUIREMENTS AND DISSERVE THE PUBLIC INTEREST

Under the Budget Act, Congress sought to facilitate the competitive and rapid deployment of PCS service to the public.²⁵ The objectives of the bidding process, as specified by Congress, include the rapid deployment of new technologies, promotion of economic opportunity, competition and public access, wide dissemination of licenses, and efficient use of the

²⁰ 5 U.S.C. § 553(b).

²¹ 5 U.S.C. § 706(2)(A). The D.C. Circuit has held that a remand for a “statement of reasons” is neither “an explicit directive [] to reopen the record [nor] to accept additional comments on the existing record.” *Eastern Carolinas Broadcasting Co. v. FCC*, 762 F.2d 95, 102 (D.C. Cir. 1985).

²² Petition at 4.

²³ “FCC Will Proceed with C Block Auction on Schedule,” FCC Public Notice, released Nov. 13, 1995.

²⁴ In its brief request for relief, CBT also ignores APA requirements for withdrawal or revocation of licenses. 5 U.S.C. § 558(c).

²⁵ 47 U.S.C. § 309(j)(3)(A-D). See *Implementation of Sections 3(n) and 332 of the Communications Act, Second Report and Order*, 9 FCC Rcd. 1411, 1460-1461 (1994) (“Congress’ intent in adopting the Budget Act was to maximize competitiveness and public availability of PCS spectrum.”) (“*Second Report and Order*”).

spectrum.²⁶ Congress also imposed a stringent deadline on completion of PCS rulemaking and commencement of PCS licensing.²⁷ In authorizing the Commission to award licenses by competitive bidding, Congress sought to facilitate deployment of PCS services “without administrative or judicial delays,” in large part to encourage U.S. competitiveness in telecommunications technologies.²⁸

The Commission has continually sought to foster the goals of competitive delivery, diversity of services, rapid deployment, and wide-area service in its PCS actions.²⁹ For example, the Commission imposed construction requirements on PCS licensees to ensure “quick deployment” of services.³⁰ More recently, in denying a previous request to delay issuance of the A and B Block licenses, the Wireless Telecommunications Bureau appropriately noted the statutory objective of rapid PCS deployment and the public interest considerations favoring prompt service:

[W]e conclude that a stay of A and B block licensing would not be in the public interest. Aside from imposing a financial burden on the A and B Block winners themselves, a stay will delay the introduction of new competition and new services to the public. Conversely, granting the licenses will further the Congressional directive to promote the development and rapid deployment of PCS for

²⁶ *Amendment of the Commission's Rules to Establish New Personal Communications Services, Memorandum Opinion and Order*, 9 FCC Rcd. 4957, 4966 (1994) (“MO&O”).

²⁷ *Budget Act*, § 6002(d)(2).

²⁸ 47 U.S.C. § 309(j)(3)(A).

²⁹ MO&O at 4966. In designating PCS as CMRS, the Commission noted that doing so “is consistent with our goal of achieving speedy deployment of PCS.” *Second Report and Order* at 1461-1462.

³⁰ *Id.* The Commission's rules require PCS licensees to offer service to one-third of the population in each market area within five years, two-thirds within seven years, and 90% within ten years of being licensed. 47 C.F.R. § 24.203(a).

the benefit of the public with a minimum of administrative or judicial delay.³¹

CBT's proposal to delay A/B Block deployment — through reassignment — conflicts with these statutory and Commission objectives. PCS licensees have paid enormous sums for the various MTA licenses and have expended additional extensive resources in a wide range of PCS deployment activities. By way of example, PCS licensees, including PrimeCo, have invested time, money and efforts in the following activities: 2 GHz microwave incumbent relocation; site acquisition; compliance with local zoning requirements; establishment of offices; hiring of staffs; equipment purchases, infrastructure design and development; system engineering; cell site construction; marketing efforts, and so forth. These efforts are geared toward providing PCS services to the public at the earliest possible date. Any delay would be extremely prejudicial to the MTA licensees' efforts. The public will be denied the benefits of a competitive wireless marketplace, including lower costs and improved service, if the A/B Block licenses are prevented from promptly deploying their systems.³² Delay will also undermine U.S. competitiveness in the global telecommunications market.

Further, the harm caused by delay would be compounded exponentially if awarded licenses were actually revoked and reassigned to others — a remedy vaguely proposed by CBT. In this regard, CBT's Petition is curiously silent about the mechanics of its so-called "reassign[ment]" proposal. As noted above, the A/B licensees have expended over \$7 billion in winning bid payments, and substantial additional amounts on PCS construction and deployment. If the auction results are upset, the federal government would, at a minimum, be required to

³¹ *Deferral of Licensing of MTA Commercial Broadband PCS*, 78 RR.2d (P&F) 1209, 1215 (1995) (footnotes omitted) (citing 47 U.S.C. § 309(j)(3)(A)).

³² *See MO&O at 4979; Amendment of the Commission's Rules to Establish New Personal Communications Services, Second Report and Order*, 8 FCC Rcd. 7700, 7710 (1993).

return the billions of dollars collected from these licensees. Because no wrongdoing on the part of the licensees is alleged, monies spent by the licensees in reliance on the government's licensing scheme would also, arguably, be subject to recoupment.³³

Finally, the government will lose money on a second A/B license spectrum auction. If the A/B licenses were rescinded and then reaucted, bidders at the second auction will obviously value the licenses less, due to the enormous losses and delays experienced by the initial A/B licensees and the related uncertainty of the auction licensing process. In sum, the economic and other effects of grant of the CBT Petition on the federal government, existing MTA licensees and the public would be devastating.

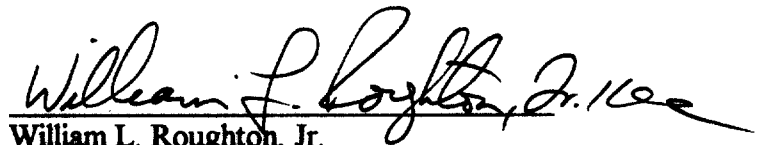
V. CONCLUSION

For the reasons stated herein, the CBT Petition should be dismissed or denied.

Respectfully submitted,

PCS PRIMECO, L.P.

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January 16, 1996

³³ Certainly, litigation seeking reimbursement of PCS construction expenditures should be expected.

CERTIFICATE OF SERVICE

I, Jo-Ann Grayton, a secretary at the law firm of Wilkinson, Barker, Knauer & Quinn, do hereby certify that copies of the foregoing "Opposition" were served this 16th day of January, 1996 by first class United States mail, postage prepaid, or via hand delivery as indicated, to the following:

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